

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUSTIN GARDNER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

4:19CV3005

MEMORANDUM AND ORDER

This matter is before the court on the Notice of Appeal (filing 27) filed by Petitioner on December 27, 2021, and a memorandum from the Clerk of the Court requesting a ruling as to Petitioner's authorization to proceed in forma pauperis on appeal (filing 28). Petitioner seeks to appeal the court's Memorandum and Order (filing 24) entered on October 28, 2021, denying his motion to substitute respondent; the May 23, 2019 Order (filing 20) issued by the Eighth Circuit Court of Appeals specifying the materials that would be reviewed in Petitioner's previous appeal; and the Judgment (filing 25) and Mandate (filing 26) issued by the Eighth Circuit Court of Appeals denying Petitioner authorization to file a successive habeas petition.

A litigant seeking to appeal a judgment must either pay the required filing fees, *see* Fed. R. App. P. 3(e), or proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). The court hereby certifies that the appeal filed by Petitioner in this case is frivolous and not taken in good faith because Petitioner has already prosecuted an appeal to the Eighth Circuit Court of Appeals in which the Court denied a certificate of appealability and dismissed the appeal on July 12, 2019. (Filing 21; *see also* Filing 22.) Moreover, the petition in this case was dismissed without prejudice on May 8, 2019, because Petitioner had not exhausted his state court remedies (filings 13 &

14), and Petitioner currently has a habeas case pending that challenges the same conviction at issue in the present case. *See Gardner v. Frakes*, 4:21-cv-03067-RGK-PRSE (D. Neb.). Since the appeal is not taken in good faith, Petitioner cannot file an appeal in forma pauperis. *See* Fed. R. App. P. 24(a)(3) and 28 U.S.C. § 1915(a)(3).

IT IS THEREFORE ORDERED that: Petitioner may not proceed on appeal in forma pauperis. This matter is closed, and Petitioner should refrain from filing any further frivolous appeals.

Dated this 6th day of January, 2022.

BY THE COURT:



Richard G. Kopf
Senior United States District Judge